

H & R Contracting Corp. and Plumbers Local Union No. 1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Case 29-CA-8060

April 1, 1981

DECISION AND ORDER

Upon a charge filed on June 6, 1980, by Plumbers Local Union No. 1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein called the Union, and duly served on H & R Contracting Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint and notice of hearing on July 21, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

On January 26, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent failed to file a response to the Notice To Show Cause and therefore the allegations of the Motion for Summary Judgment stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The Respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the Respondent is without knowledge, in which case the Respondent shall so state, such statement operating as a denial. All the allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be

true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent¹ herein specifically states that unless an answer to the complaint is filed within 10 days of service thereof "all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." According to the uncontroverted allegations of the Motion for Summary Judgment, a letter dated December 17, 1980, was sent to Respondent by registered mail stating that an answer had not been received and that if no answer were filed counsel for the General Counsel would move for summary judgment. On December 29, 1980, Respondent's president, Charles Rosenthal, telephoned counsel for the General Counsel. At that time counsel for the General Counsel informed Rosenthal that unless Respondent filed an answer by January 8, 1981, a motion for summary judgment would be filed with the Board; Rosenthal then stated that he would submit an answer on behalf of Respondent immediately. By letter dated December 30, 1980, counsel for the General Counsel confirmed her intention to file the Motion for Summary Judgment in the event that Respondent's answer to the complaint was not received as requested. Pursuant to Rosenthal's request, a duplicate copy of the complaint and notice of hearing was enclosed with this letter.

Accordingly, no good cause having been shown for the failure to file a timely answer, the allegations of the complaint are deemed admitted and are found to be true and we hereby grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

H & R Contracting Corp., at all times material herein, has been a New York corporation with its principal place of business located in Brooklyn, New York, where it is and has been at all times material herein engaged in performing plumbing and contracting and related services. During the year preceding the issuance of the complaint (a period which was representative of its annual operations generally), Respondent performed services valued in excess of \$50,000 for various enterprises located in the State of New York, which enterprises in turn shipped goods valued in excess of

¹ According to the uncontroverted allegations of the Motion for Summary Judgment, Respondent was served a copy of the complaint by registered mail in accordance with Sec. 102.11 of the Board's Rules and Regulations, Series 8, as amended, and Sec. 11(4) of the Act.

\$50,000 to firms located outside the State of New York, and which enterprises are engaged in interstate commerce. We therefore find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Plumbers Local Union No. 1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

At all times material herein the Union has been designated and recognized by Respondent as the exclusive collective-bargaining representative of Respondent's employees in a unit consisting of all plumbing employees, excluding all office clerical employees, guards, and supervisors. The relationship between the Union and Respondent has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period August 4, 1978, until August 3, 1981. This collective-bargaining agreement provides, *inter alia*, that Respondent shall transmit payments to the pension, welfare, security benefits, and vacation funds of the Union on a monthly basis; however, since on or about January 1, 1980, Respondent has failed and refused to make such payments.

Accordingly, we find that Respondent, by failing and refusing since January 1, 1980, to make such payments as provided for in the contract, has refused, and continues to refuse, to bargain collectively with the representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the

meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent has failed to make required monthly contributions to the Union's pension, welfare, security benefits, and vacation funds since on or about January 1, 1980. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make its employees whole by transmitting the required contributions to the Union's pension, welfare, security benefits, and vacation funds, with interest, if appropriate, to be determined in the manner described in *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).²

The Board, upon the basis of the foregoing uncontested facts, makes the following:

CONCLUSIONS OF LAW

1. H & R Contracting Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Plumbers Local Union No. 1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by failing to make required monthly contributions to the Union's pension, welfare, security benefits, and vacation funds since on or about January 1, 1980, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

² There, the Board explained that

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, H & R Contracting Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with Plumbers Local Union No. 1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, by failing and refusing to make contractually required monthly contributions to said Union's pension, welfare, security benefits, and vacation funds.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," for Respondent's unlawful failure since on or about January 1, 1980, to transmit contractually required contributions to the Union's pension, welfare, security benefits, and vacation funds.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and all other records necessary to analyze the amount of the contributions due under the terms of this Order.

(c) Post at its Brooklyn, New York, place of business copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are

customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail and refuse to make monthly contributions to the pension, welfare, security benefits, and vacation funds of Plumbers Local Union No. 1, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, as required by our collective-bargaining agreement with Plumbers Local Union No. 1.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL make whole our employees by transmitting contributions dating from on or about January 1, 1980, to the pension, welfare, security benefits, and vacation funds of Plumbers Local Union No. 1, as required by our collective-bargaining agreement with Plumbers Local Union No. 1.

H & R CONTRACTING CORP.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."